May 2005

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Prior Testimony.

Insert the following text after the quoted paragraph near the bottom of page 112:

Admission of an unavailable witness's statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. In *United States v Garcia-Meza,* ___ F3d ___, ___ (CA 6, 2005), the defendant admitted killing his wife but argued that he did not possess the requisite intent to be convicted of first-degree murder. The trial court admitted as excited utterances the victim's statements made to police after a prior assault. The defendant argued that the victim's statements were inadmissible under *Crawford v Washington*, 541 US 36 (2004). The Sixth Circuit rejected this argument and stated:

> "[T]he Defendant has forfeited his right to confront [the victim] because his wrongdoing is responsible for her unavailability. *See Crawford*, 541 U.S. 36, 124 S. Ct. at 1370 ('[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds'); *Reynolds v. United States,* 98 U.S. 145, 158–59 (1879) ('The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence

> is admitted to supply the place of that which he has kept away. . . . The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.')."

The *Garcia-Meza* Court also rejected the defendant's assertion that forfeiture only applies when a criminal defendant kills or otherwise prevents a witness from testifying with a specific intent to prevent him or her from testifying. Although FRE 804(b)(6) (and MRE 804(b)(6)) may contain this requirement, it is not a requirement of the Confrontation Clause. *Garcia-Meza, supra* at ___.

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.35 Settlements

Add the following new subsection (G) on page 207:

G. Disclosure of Settlement

In a case of first impression, the Court of Appeals held the trial court has discretion to disclose to the jury the existence of "high-low" settlements between the plaintiff and some defendants who remain in the case. *Hashem v Les Stanford Oldsmobile, Inc,* ___ Mich App ___, ___ (2005). Such "high-low" or "Mary Carter" agreements distort the adversarial process, undermining the right to a fair trial. The interest of fairness served by disclosure to the jury of the true alignment of the parties must be weighed against the countervailing interest in encouraging settlements and avoiding prejudice to the parties. *Id.* at ___. "[T]he trial court has both a duty and the discretion to fashion procedures that ensure fairness to all litigants in these situations." *Id.* at ___. A Mary Carter agreement is not a release, so the settling defendant remains in the case, but the argreement limits the settling defendant's potential liability and provides that defendant an incentive to assist the plaintiff's case against the other defendants. The agreement is kept secret from the other parties and the court. See *Smith v Childs,* 198 Mich App 94, 97-98 (1993).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.14 Double Jeopardy

B. Multiple Prosecutions for the Same Offense

Successive State and Federal Prosecutions.

On page 316, replace the text in this paragraph with the following:

The Double Jeopardy Clause does not bar successive state and federal prosecutions of a defendant for offenses arising from the same criminal episode. *People v Davis*, 472 Mich 156, 162 (2005), citing *Bartkus v Illinois*, 359 US 121 (1959). Because federal and state prosecutorial authority is derived from two distinct and independent sources, a defendant whose conduct violates both federal and state law commits two offenses subject to punishment by both sovereigns. *Davis, supra*.

Add the following text to the bottom of page 316:

The "Separate Sovereign" Rule. The dual sovereignty rule for successive federal and state prosecutions also applies to cases involving successive state prosecutions. Double jeopardy does not prohibit successive state prosecutions where a defendant's conduct violates the law in more than one state and more than one state seeks to prosecute the defendant for a crime resulting from that conduct. *People v Davis*, 472 Mich 156, 158 (2005). In *Davis*, the Double Jeopardy Clause did not bar the State of Michigan from prosecuting a defendant who had already been convicted and sentenced in Kentucky for offenses under Kentucky law that arose from the same conduct on which Michigan based its charges against the defendant. Successive state prosecutions do not violate a defendant's double jeopardy protections if the entities involved are "separate sovereigns." A state is a sovereign separate from another state when it derives its prosecutorial authority from a source independent of the other state's source of authority. *Id.* at 166–167.

C. Multiple Punishments for the Same Offense

Insert the following text on page 317, before the beginning of subsection (D):

See also *People v Meshell*, ___ Mich App ___, ___ (2005), where the Court concluded that the Legislature did *not* intend multiple punishments when a defendant was convicted of both operating/maintaining a methamphetamine laboratory and operating/maintaining a methamphetamine laboratory within 500 feet of a residence. Under the "same-elements" test, there exists a presumption that the Legislature did not intend multiple punishments because all the elements of one offense are contained in the elements of the other offense. Further evidence that multiple punishments were not intended is found in the statutory language that provides for more severe punishment when the conduct prohibited under MCL 333.7401c(2)—operating/ maintaining a methamphetamine laboratory—occurs in certain locations or under certain circumstances (e.g., in the presence of a minor, involving possession or use of a firearm, etc.).

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.43 Defendant's Conduct and Appearance at Trial

A. Presumption of Innocence

2. Handcuffs/Shackles

Insert the following text after the first full paragraph on page 418:

An appellate court's harmless error analysis requires more than a cursory review of the totality of circumstances under which a defendant was convicted when no justification existed for shackling a defendant during his jury trial. *Ruimveld v Birkett*, ___ F3d ___ (CA 6, 2005).

In *Ruimveld*, the Michigan Court of Appeals concluded that although the defendant was improperly shackled during trial, the error was harmless. The Sixth Circuit Court of Appeals noted that the Michigan Court failed to conduct a meaningful review of the circumstances surrounding the defendant's conviction, which, according to the Sixth Circuit, clearly showed that the defendant's shackling likely had a substantial and injurious effect on the jury's verdict. The Sixth Circuit pointed out that the Michigan Court failed to consider the fact that "[t]he evidence against [the defendant] was merely circumstantial . . . that the jury deliberated for over three hours despite the simple facts, and made inquiries to the judge regarding presumptions of innocence, burdens of proof, and reasonable doubt. Given the closeness of the case, the effect of any error was thus likely to be magnified." *Id.* at ___.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.48 Jury Instructions

C. Instructions on Lesser-Included Offenses

1. Necessarily Included Lesser Offenses

Insert the following text before the last paragraph on page 433:

See also *People v Walls*, ___ Mich App ___, ___ (2005), where the Court concluded that felonious assault (MCL 750.82) is a cognate lesser offense of assault with intent to rob while armed (MCL 750.89) and not a necessarily included lesser offense as the defendant argued. Whereas a conviction for felonious assault requires that the offender possess a dangerous weapon, a conviction for assault with intent to rob while armed may be based on the offender's possession of "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon." MCL 750.89. Because conviction of felonious assault (lesser offense) requires possession of a dangerous weapon and conviction of assault with intent to rob while armed (greater offense) does not require possession of a dangerous weapon, it is possible to commit the greater offense without first committing the lesser offense. *Walls, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.60 Probation Violation

F. Appeal Rights

Replace the paragraph at the bottom of page 469 with the following text:

*Effective May 1, 2005.

On the record and immediately after imposing a sentence that involves incarceration, the court must advise the probationer of his or her appellate rights. If the underlying conviction resulted from a trial, the probationer has an appeal of right. MCR 6.445(H)(1)(a).* If the underlying conviction resulted from a guilty or nolo contendere plea, the probationer is entitled to file an application for leave to appeal. MCR 6.445(H)(1)(b).